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March 4, 2011

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Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

**Re: *Reply of Tongue River Railroad Company, Inc. To Petition To Reopen*
STB Finance Docket No. 30186 (Sub No. 3)¹**

Dear Ms. Brown:

We are writing on behalf of Tongue River Railroad Company, Inc. ("TRRC") in reply to the February 17, 2011 letter submitted on behalf of Northern Plains Resource Council and Mark Fix ("Petitioners"), who seek to reopen these proceedings for supplemental environmental review.

Petitioners argue in their February 17 letter that mining at Otter Creek cannot be considered speculative, pointing to the fact that lessee Ark Land Company ("Ark") paid \$86 million for the leases to the coal tracts at Otter Creek, has argued in a state court lawsuit that the leases represent a property right, and has filed with the Montana Department of Environmental Quality ("MDEQ") an application for a prospecting permit.² None of these facts, however,

¹ The Petition to Reopen also embraces Finance Docket No. 30186, *Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT*, and Finance Docket No. 30186 (ICC 1985) (*TRRC I*); and Finance Docket No. 30186 (Sub No. 2), *Tongue River Railroad Company—Rail Construction and Operation—Ashland to Decker, Montana*.

² The referenced state court lawsuit is the same case about which TRRC wrote to the Board on February 4, 2010 to advise that the Court had denied the defendants' motions to dismiss, allowing NPRC and others to proceed with their claim that the Otter Creek leases were improperly issued because the State relied on an allegedly unconstitutional exemption from the requirements of the Montana Environmental Policy Act. *Northern Plains Resource Council, et al. v. Montana Board of Land Commissioners, et al.*, Nos. DV-38-2010-2480 and DV-38-2010-2481 (Dec. 29, 2010).

warrants supplementation of the cumulative impacts analysis in the TRRC EISs because none constitutes, as the CEQ regulations on supplementation require, "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c). *Compare R.J. Corman/Pennsylvania Lines, Inc. – Construction and Operation Exemption – In Clearfield County, PA*, STB F.D. 35116 (March 4, 2011) (Supplemental DEIS issued on basis of a change in development project to include the transport of hazardous materials, a change in the approval status of an alternative roadway warranting more detailed analysis and new information on endangered species).

TRRC has previously argued why the leasing of the Otter Creek tracts sheds no new light on the volume, precise location or other characteristics of the mining that might occur at Otter Creek so as to warrant supplementation. Further, the fact that Ark has described the lease as a property right proves nothing. If the leases were validly issued – and NPRC is arguing to a Montana Court that they were not, while simultaneously arguing to this Board that they justify reopening and supplementation – then they confer property rights. However, for NEPA purposes this is of little import since the question raised by a request for supplementation is whether from the perspective of environmental concerns or impacts the leases are a significant new development warranting additional analysis. That answer remains no.

The prospecting application recently filed by Ark and attached to Petitioners' February 17 letter also does not change this situation. Such an application is no more than a request (which has not yet been granted by MDEQ) for the opportunity to undertake exploratory geological studies "for the purpose of determining the location, quantity and quality of a mineral deposit." *See* <http://deq.mt.gov/CoalUranium/prospect.mcp> Far from being anything close to a final step prior to development of a mine, it is no more than the first of many requests for permission and other steps that would need to be taken at Otter Creek before mining could commence, a prospect that is at least several years away. Indeed, there can be no mining at Otter Creek unless the geologic studies not yet undertaken warrant moving forward; all of the required permissions (including most notably a mining permit) are obtained; all environmental reviews under MEPA associated with any such permit are successfully completed, and necessary financing is arranged, among other prerequisites. Given these contingencies, it is impossible to conclude that mining at Otter Creek is any more "reasonably foreseeable" within the meaning of CEQ's cumulative impacts definition now than it was at the time that the EISs were prepared in the TRRC proceedings such that supplementation of the previously completed cumulative impacts analyses would be warranted. *See* 40 CFR § 1508.7.

Finally, Petitioners claim that the Board reopened these proceedings to revise the associated Programmatic Agreement based on a change in circumstances and that it should do the same to address development of the Otter Creek mines. However, the Board did not reopen its decisions approving construction of the TRRC line, but rather only invited parties to consult on possible revisions to the Programmatic Agreement given that that Agreement is now set to

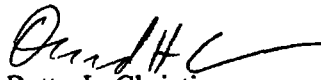
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expire on September 1, 2011, having been extended from its initial expiration date of November 1, 2010.³

For the reasons discussed above and in previous filings by TRRC in these proceedings, Petitioners have not shown any changed circumstances that materially affect the Board's prior decision or present a seriously different picture of the environmental landscape than that previously analyzed by the Board in its EISs. In these circumstances, the Petition to Reopen should be denied.

Respectfully submitted,



Betty Jo Christian

David H. Coburn

Attorneys for Tongue River Railroad Company, Inc.

cc: All parties of record

³ See *Tongue River Railroad Company, Inc —Construction and Operation—Western Alignment*, 76 Fed. Reg. 5,649, 5,649 (Surface Transportation Board Feb. 1, 2011).

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March 2011, I have caused a copy of the foregoing Letter of Tongue River Railroad Company, Inc. to be served by first-class mail, postage prepaid, on counsel for the parties of record in STB Finance Docket Nos. 30186, 30186 (Sub-No. 2), and 30186 (Sub No.3).


David H. Coburn